

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE PADRON)	
Claimant)	
VS.)	
)	
KAISER CONTRACT CLEANING SPECIALISTS, INC., and PSSI)	
Respondent)	Docket Nos. 1,056,267
)	& 1,056,268
AND)	
)	
AMERICAN ZURICH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

The parties appealed the September 23, 2013, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on January 7, 2014.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Darin M. Conklin of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed the Board may consult the *Guides*.¹ Respondent stipulated that claimant met with personal injury by accident on December 31, 2010, and February 10, 2011, arising out of and in the course of his employment.

ISSUES

The ALJ found claimant was not credible and did not sustain a permanent impairment resulting from his accidental injuries. ALJ Fuller found claimant was entitled

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

to unauthorized medical benefits not to exceed \$500.00 and assessed fees and expenses of administration against respondent, including the court reporter fees for deposing Dr. Vito J. Carabetta.

Claimant contends: (1) he sustained personal injuries by accident on December 31, 2010, and February 10, 2011, arising out of and in the course of his employment with respondent; (2) his average weekly wage is \$330.00; (3) he sustained an 18% whole body functional impairment and (4) he sustained a 93.5% work disability. Claimant requests the Board modify the September 23, 2013, Award.

Respondent requests the Board affirm ALJ Fuller's findings regarding the lack of claimant's credibility and permanent impairment. Additionally, respondent asserts the costs of Dr. Carabetta's IME examination, report and to take his deposition should be assessed to claimant.

The issues before the Board on this appeal are:

1. Did claimant sustain a permanent functional impairment and what is the nature and extent of his disability?
2. What is claimant's average weekly wage?
3. Should the costs of Dr. Carabetta's IME examination, report and deposition be assessed to claimant?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

In Docket No. 1,056,267, claimant fell over a belt on December 31, 2010, and claimed injuries to his back and left hand, wrist, elbow and shoulder. At the time, claimant worked for Kaiser Contract Cleaning Specialists, Inc. In Docket No. 1,056,268, claimant fell on ice on February 10, 2011, and claimed injuries to his back, buttocks, left wrist and elbow. At the time, claimant worked for PSSI, who bought Kaiser. Both respondents were insured by American Zurich Insurance Company. At the June 2013 regular hearing, claimant testified he occasionally used a cane "[b]ecause I get nervous that my [left] leg is going to give in and to fall."² He testified he has pain in his low back and pain and numbness in his left lower extremity. On a scale of zero to ten, with zero being no pain and ten placing him in an emergency room, claimant indicated his pain was between seven and eight. When the pain was not as severe, claimant would be at a five or six.

² R.H. Trans. at 25.

At the regular hearing, claimant indicated he was claiming injuries to his back, buttocks and left leg. He indicated that at one time he complained of a left shoulder problem, but it had corrected itself.³ At Dr. Carabetta's deposition, claimant's attorney acknowledged that claimant had withdrawn his request for benefits for his left upper extremity.⁴

Following his two accidents, claimant was evaluated and treated at respondent's request by Dr. John P. Estivo. Dr. Estivo first saw claimant on September 2, 2011. The doctor's impressions were: (1) left shoulder pain with soft tissue mass, possible seroma versus hematoma; (2) lumbar radiculopathy and (3) left elbow lateral epicondylitis. The doctor indicated claimant could have injured his back as the result of each of the accidents. Dr. Estivo recommended claimant undergo MRIs of the left shoulder and lumbar spine and that the left elbow epicondylitis be treated with physical therapy, anti-inflammatory medications and injections.

Dr. Estivo testified neither his examination of claimant nor claimant's medical records of care and treatment following the February 2011 injury revealed objective signs of a low back injury. The doctor testified that on September 2, 2011, claimant was not limping. Dr. Estivo indicated he neither received nor identified any information that indicated claimant had thoracic or cervical spine pain or soreness. Claimant, however, did complain to Dr. Estivo of having low back and leg pain.

Dr. Estivo saw claimant on November 23, 2011, after he underwent MRIs of the left shoulder and lumbar spine. The lumbar spine MRI revealed age-related degenerative changes at L4-5 and L5-S1 and foraminal stenosis bilaterally at L4-5, but no other abnormalities. The doctor indicated the lumbar spine MRI revealed no evidence of an injury on December 30, 2010,⁵ or February 10, 2011. Dr. Estivo's impressions were: (1) left shoulder rotator cuff tendinitis, (2) lipoma to the left shoulder, unrelated to the work injury claim, (3) lumbar spine strain with occasions of left leg pain and (4) degenerative disc disease at L4-5 and L5-S1. Claimant declined a lumbar spine epidural injection at that time. The doctor prescribed meloxicam and Tramadol and gave claimant a left shoulder injection. He also prescribed physical therapy for claimant's low back and left shoulder. Claimant was allowed to work with temporary restrictions.

On January 5, 2012, claimant underwent an epidural injection at L4-5 by Dr. Estivo. On January 25, 2012, Dr. Estivo gave claimant a second lumbar spine epidural injection and continued the meloxicam and Tramadol prescriptions. The doctor indicated the left

³ *Id.* at 18.

⁴ Carabetta Depo. at 7.

⁵ Respondent's attorney erroneously used the date December 30, 2010, instead of December 31, 2010, when questioning Dr. Estivo.

shoulder rotator cuff tendinitis had resolved and claimant had a lumbar spine strain and a bulging degenerative disc at L4-5. Dr. Estivo saw claimant a final time on February 15, 2012, and his impressions were lumbar spine strain, a bulging disc at L4-5 and symptom magnification. The doctor stated:

In my opinion, this patient is magnifying his symptoms to a significant degree at this point. It is my opinion at this point this patient seems to be exaggerating his symptoms and I am not convinced he is being truthful. I can find nothing objectively wrong with him. He has subjective complaints of left leg pain. He has normal age-related degenerative changes to his lumbar spine, which are a consequence of aging and have nothing to do with his injury claim. At this time I would place him in DRE lumbosacral category I, giving him a 0% whole person impairment in relation to the injury claim of 12/31/2010. In my opinion he does not require any restrictions in relation to the claim of 12/31/2010. He does not require any further medical treatment in relation to that injury claim. . . .⁶

Dr. Estivo indicated that when he last saw claimant on February 15, 2012, under the *Guides*, claimant had no permanent impairment to the left upper extremity or low back. The doctor indicated claimant would need no permanent restrictions as the result of his December 30, 2010,⁷ or February 10, 2011, accident. At the February 15, 2012, visit, claimant had a pronounced limp and was using a cane. Dr. Estivo indicated that he did not observe claimant have muscle spasms during any of the appointments.

At the request of claimant's attorney, claimant was evaluated by Dr. Pedro A. Murati on April 3, 2012. The doctor took a history from claimant, physically examined claimant and reviewed the medical records of Drs. Estivo, Shah and Thakur. Dr. Murati's impressions were low back pain and signs and symptoms of radiculopathy, left shoulder sprain and myofascial pain syndrome affecting the cervical and thoracic paraspinals. The doctor indicated that within a reasonable degree of medical probability, claimant's diagnoses were a direct result of his work-related injuries on December 31, 2010, and February 10, 2011. Dr. Murati indicated that during the appointment, claimant was not limping, nor using a cane.

Dr. Murati opined that pursuant to the *Guides*, claimant had a 6% left upper extremity functional impairment for loss of range of motion of the left shoulder, which converts to a 4% whole body functional impairment. Dr. Murati placed claimant in: (1) Lumbosacral DRE Category III for his low back pain with signs and symptoms of radiculopathy for a 10% whole body impairment, (2) Cervicothoracic DRE Category II for myofascial pain syndrome affecting the cervical paraspinals for a 5% whole body

⁶ Estivo Depo., Ex. 2.

⁷ As indicated above, respondent's attorney erroneously used the date December 30, 2010, instead of December 31, 2010, when questioning Dr. Estivo.

impairment and (3) Thoracolumbar DRE Category II for myofascial pain syndrome affecting the thoracic paraspinals for a 5% whole body impairment. Dr. Murati testified claimant had trigger points, which is a requirement for myofascial pain syndrome. The doctor also documented muscle spasms. The whole body impairments combined for a 22% whole body functional impairment. Dr. Murati assigned claimant significant permanent restrictions.

On cross-examination, Dr. Murati admitted he reviewed one lumbosacral x-ray that was unremarkable and that he never reviewed Dr. Carabetta's IME report. Nor did Dr. Murati review claimant's MRIs. The doctor admitted there was no organic explanation for numbness and a decrease of sensation in claimant's left lower extremity.

By order of the ALJ, claimant was evaluated by Dr. Carabetta on September 5, 2012. The doctor observed during the evaluation that claimant's gait was guarded, he had a pronounced limp and he used a cane. However, Dr. Carabetta observed that claimant's gait improved while walking on the asphalt area of the parking lot outside the doctor's office building. The doctor noted in his report that claimant's upper extremity range of motion was full normal for all joints in all planes, but claimant experienced an increase in symptoms at the left shoulder with any and all movements.

Dr. Carabetta conducted a thorough physical examination of claimant's lumbar spine. The straight leg raise test was negative at 90 degrees bilaterally when done in a seated position, but was reported to be positive on the left side at 10 degrees and on the right side at 20 degrees when done in a formal supine position. Palpation of the lumbosacral spine and lower extremities was noteworthy for an absence of any paraspinous muscle spasm or specific point tenderness. Lasegue's maneuver and Bragard's sign were negative bilaterally. Claimant had full lower extremity range of motion and normal lower extremity muscle bulk. The FABER test, also known as Patrick's sign, was negative bilaterally. Gaenslen's test to determine sacroiliac joint dysfunction was also negative bilaterally. Dr. Carabetta's impressions were low back pain, left lateral epicondylitis and left rotator cuff tendinitis, by history.

Dr. Carabetta testified claimant's symptoms of radiculopathy were subjective. The doctor indicated that a negative Bragard's indicates there was no sign of radiculopathy. The doctor ceased attempting to measure claimant's lumbar range of motion because claimant was not giving a valid effort. The doctor stated, "I actually gave up pretty quickly and didn't try for repeated efforts because we were going nowhere with it."⁸

Dr. Carabetta stated in the IME report:

⁸ Carabetta Depo. at 12.

With a lack of findings, as Table 72 on page 110 [of the *Guides*] is referenced, by definition he really should be a Category I presentation, which by definition would have a 0% impairment. However, though he reports constant symptoms, it is possible that at this late time he may have variable findings, and spasm may be intermittently present. With this in mind, I would recommend to the Court consideration of a Category II situation, and therefore a 5% whole person impairment.⁹

Dr. Carabetta also assigned claimant permanent physical restrictions of occasional lifting of no more than 30 pounds, frequent lifting or carrying no more than 15 pounds, limiting bending and stooping activities to occasionally and overhead activity within the foregoing weight limits for 10-15 seconds at a time.

Claimant was video recorded by a private investigator, Daryl Bugner, on July 30 and 31, 2012. Mr. Bugner testified that on July 30, 2012, he followed claimant, who was accompanied by a young female, from claimant's home to a location at Club View Drive, both in Dodge City. Mr. Bugner testified that at the Club View Drive location, a private home, he observed claimant doing yard work, cleaning up brush, walking around and doing a lot of bending and stooping. Mr. Bugner testified that on July 30 and 31, he did not observe claimant displaying pain, limping or using a cane.

The July 30 surveillance recording shows claimant using hand clippers to trim a hedge. He rakes, bends at the waist, crouches and uses his left upper extremity to forcefully pull vines from a bush. In the July 31 surveillance recording, claimant does gardening work at the same home. Claimant is observed crouching for several minutes at a time, bending and stooping. In the July 30 and 31 surveillance recordings, claimant did not use a cane and had no limp. The recordings show a young lady assisting claimant by holding a trash bag and doing yard work.

Claimant, at the regular hearing, acknowledged working in a woman's yard and not using a cane or losing his balance when working there. He acknowledged using his left arm constantly to pull vines out of bushes, bending, stooping, using a weed eater and trimming trees above his head with trimmers. Claimant also admitted that he transported his mower in his car to the woman's home, but had help with the mower. He testified he worked two hours on one day and two and one-half hours on another, but quit because of acute pain. Claimant said he took his stepdaughter along to assist him because he could not do the job alone. He also testified the surveillance recordings did not show the times he went to his car to take a pill, presumably for pain.

Surveillance recording was also carried out on September 5, 2012. It shows claimant exiting a vehicle and walking across a parking lot at approximately 12:27 p.m. for his appointment with Dr. Carabetta. Claimant returned to the vehicle by walking across the

⁹ *Id.*, Resp. Ex. A at 4.

same parking lot at 1:41 p.m. On both occasions, claimant walks with a pronounced limp and uses a cane. The September 5 surveillance recording also shows claimant walking from a vehicle into a Subway restaurant at approximately 1:54 p.m. and walking out of the Subway restaurant at approximately 2:21 p.m. On both occasions, claimant has no limp and uses no cane.

Claimant also viewed the September 5, 2012, surveillance recording. He testified he has never been prescribed a cane, but took to using a cane on his own. Claimant indicated when he got to Dr. Carabetta's office he had been riding in a vehicle for several hours and his leg was numb and he used the cane for stability. When asked about leaving Dr. Carabetta's office with a cane and a limp and walking into Subway without a cane and a limp, claimant testified he took pills at Dr. Carabetta's office and used the cane for necessity only.

Dr. Murati was not asked about the surveillance recordings of claimant. Dr. Estivo viewed the July 30 and 31, 2012, surveillance recordings of claimant and indicated he did not observe any limping or altered gait or any evidence of a left upper extremity or low back impairment. Nor did the doctor observe any pain behavior by claimant in the surveillance recordings. Dr. Estivo indicated claimant's behavior in the surveillance recordings was not consistent with his subjective complaints.

After reviewing the September 5, 2012, surveillance recording, Dr. Carabetta testified there was reason to doubt claimant's integrity. The doctor indicated that the surveillance recordings of July 30, 31 and September 5, 2012, changed his opinion on claimant's functional impairment from a 5% whole body impairment for claimant's low back to a 0% functional impairment. In light of the surveillance recordings, Dr. Carabetta withdrew the physical restrictions he imposed on claimant. The doctor also indicated he did not observe claimant taking any pain medication during the IME appointment.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹⁰ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."¹¹ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability.

¹⁰ K.S.A. 2010 Supp. 44-501(a).

¹¹ K.S.A. 2010 Supp. 44-508(g).

Claimant's brief to the Board indicates that claimant's left arm/shoulder issue has resolved.¹² Therefore, the Board finds claimant sustained no permanent functional impairment to his left upper extremity. The Board, like ALJ Fuller, finds claimant sustained no permanent impairment nor has any permanent restrictions. Claimant did not come close to meeting his burden of proof.

Dr. Estivo found no objective findings that claimant sustained left upper extremity or low back permanent functional impairments and assigned claimant no permanent restrictions. The doctor also indicated claimant was engaged in symptom magnification. Moreover, Dr. Estivo saw claimant on several occasions. The doctor indicated claimant's behavior in the surveillance recordings was not consistent with his subjective complaints.

Dr. Carabetta, the court-appointed IME doctor, observed claimant limping and using a cane at the IME appointment and in the parking lot outside the doctor's office building. Prior to viewing the surveillance recordings of claimant, Dr. Carabetta assigned claimant permanent restrictions and indicated the ALJ should consider finding claimant had a 5% whole body functional impairment for his low back. The surveillance recordings convinced Dr. Carabetta that claimant has a 0% whole body functional impairment for his low back and the doctor withdrew the permanent restrictions he assigned. Dr. Carabetta indicated claimant's symptoms of radiculopathy were subjective.

Dr. Murati's opinions on functional impairment and the permanent restrictions he assigned claimant are dubious. Dr. Murati was not asked about the surveillance recordings depicting claimant bending, stooping, extensively using his left upper extremity and walking without a limp or a cane. The doctor reviewed one lumbosacral x-ray, but not claimant's MRIs. Nor did Dr. Murati review Dr. Carabetta's report. When formulating his opinions, Dr. Murati chose to rely on claimant's subjective complaints, rather than objective findings.

ALJ Fuller found claimant was not credible and the Board concurs. Here, the ALJ had the opportunity to assess claimant's testimony and credibility. The Board acknowledges and recognizes the advantage of the ALJ to assess witness credibility.¹³ As the Kansas Court of Appeals noted in *De La Luz Guzman-Lepe*,¹⁴ appellate courts are ill suited to assessing credibility determinations based in part on a witness' appearance and demeanor in front of the fact finder. "One of the reasons that appellate courts do not

¹² Claimant's Brief at 2 (filed Oct. 28, 2013).

¹³ See *Cannon v. Sanders Construction*, No. 198,389, 1995 WL 715327 (Kan. WCAB Nov. 8, 1995).

¹⁴ *De La Luz Guzman-Lepe v. National Beef Packing Company*, No. 103,869, 2011 WL 1878130 (Kansas Court of Appeals unpublished opinion filed May 6, 2011).

assess witness credibility from the cold record is that the ability to observe the declarant is an important factor in determining whether he or she is being truthful.”¹⁵

The July 30 and 31, 2012, surveillance recordings show claimant engaged in bending, stooping, crouching, extensively using his left upper extremity and walking without a limp or cane. Claimant’s testimony that he had to quit after working two to two and one-half hours because of pain is not believable, as the surveillance recordings do not depict claimant exhibiting pain. Perhaps most damaging of all to claimant is the September 5, 2012, surveillance recording. At 1:41 p.m., claimant, after seeing Dr. Carabetta, walked across the parking lot with a pronounced limp using a cane. Thirteen minutes later, at 1:54 p.m., claimant walks from his vehicle into a Subway restaurant with nary a limp and without a cane. The Board finds implausible claimant’s explanation that he took medication at Dr. Carabetta’s office and within a few minutes was sufficiently without pain that he no longer limped nor needed a cane.

In light of the Board’s ruling that claimant sustained no permanent impairment nor restrictions, it is unnecessary for the Board to address the issues of the nature and extent of claimant’s disability and average weekly wage. The final issue for the Board to decide is whether to grant respondent’s requests it not be required to pay the costs associated with Dr. Carabetta’s IME, report and the court reporter fees for Dr. Carabetta’s deposition. In a July 13, 2012, Order, the ALJ ordered respondent to pay for the costs of Dr. Carabetta’s examination and report. The Award orders respondent to pay the court reporter fees for Dr. Carabetta’s deposition.

In *Fehrenbacher*,¹⁶ the Board did not require claimant to pay costs of transcripts as directed by the ALJ, but indicated costs may be assessed against a claimant when an egregious claim arises. In the past, the Board has been reluctant to grant such requests.¹⁷ However, in extremely rare instances the Board has done so.¹⁸ Here, the Board finds claimant’s behavior was egregious and deceitful, as was evidenced by the surveillance recordings.

¹⁵ *State v. Scaife*, 286 Kan. 614, 624, 186 P.3d 755 (2008).

¹⁶ *Fehrenbacher v. Aldersgate Village*, No. 1,029,187, 2007 WL 4662002 (Kan. WCAB Dec. 2007).

¹⁷ *Crawford v. Wolf Creek Nuclear Operating Corp.*, Nos. 157,443, 195,627 & 195,628, 2003 WL 22150537 (Kan. WCAB Aug. 29, 2003), *aff’d* (Kansas Court of Appeals unpublished opinion filed July 2, 2004); *Birmingham v. Deffenbaugh Disposal Services*, No. 208,094, 1999 WL 292835 (Kan. WCAB Apr. 30, 1999), *aff’d* (Kansas Court of Appeals unpublished opinion filed June 16, 2000) and *Fahringer v. IBP, Inc.*, Nos. 159,418 & 159,419, 1997 WL 306951 (Kan. WCAB May 30, 1997).

¹⁸ *Gomez-Chavarria v. Cargill Meat Solutions*, No. 1,031,604, 2009 WL 4674071 (Kan. WCAB Nov. 16, 2009).

K.S.A. 44-555 permits the ALJ or Director to assess court reporter fees to any party in the proceedings. Therefore, the Board orders claimant to pay for the court reporter fees for taking Dr. Carabetta's deposition. K.S.A. 44-510e(a) and K.S.A. 44-516 permit an ALJ to have a claimant examined by a neutral physician. In *Winters*,¹⁹ the Kansas Court of Appeals ruled the ALJ, in exercise of sound discretion, has authority to assess costs of a neutral physician's examination to a party. Accordingly, the Board assesses the costs of Dr. Carabetta's examination and IME report to claimant. However, the Board can find no authority to assess Dr. Carabetta's deposition fee to claimant.

CONCLUSION

1. Claimant sustained no permanent impairment nor permanent restrictions as the result of his December 31, 2010, and February 10, 2011, work accidents.
2. Claimant is ordered to pay the costs of Dr. Carabetta's examination of claimant and IME report and the court reporter fees for Dr. Carabetta's deposition.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²⁰ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the September 23, 2013, Award entered by ALJ Fuller by ordering claimant to pay the court reporter fees for Dr. Carabetta's deposition. The Board also orders claimant to pay the costs of Dr. Carabetta's examination of claimant and IME report. The Board affirms and adopts the remaining orders set forth in the Award.

IT IS SO ORDERED.

¹⁹ *Winters v. GNB Battery Technologies*, 23 Kan. App. 2d 92, 927 P.2d 512 (1996).

²⁰ K.S.A. 2012 Supp. 44-555c(k).

Dated this ____ day of March, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Pamela J. Fuller, Administrative Law Judge